

HAS CAPITALISM FAILED IN LAW ?¹

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I

HAS capitalism failed? Most persons, even many capitalists, will answer in the affirmative. Many economists will side with them. The question is, indeed, basically economic, but it also embraces all the other provinces of social life. I will try to consider, as far as possible, only one side of the problem: Has capitalism failed in law? My answer will be in the negative: Capitalism has not failed in law nor, for that matter, in economics.

Such a sweeping assertion is evidently influenced by a certain politico-philosophical conviction. I want to state my own point of view at the outset: it is liberalism. This is a very unpopular standpoint, to be sure, but this cannot shake my conviction. On the contrary! Nobody can deny that the economic world is an unprecedented chaos. Therefore, all popular attempts to correct capitalism, which have had, and still have, an influence on economics, such as socialism, communism, interventionism, nationalism, fascism, are likely to have contributed to that hodge-podge. Liberalism alone has ceased to be considered a cure for the evils of capitalism.

II

Let us first hear the usual criticism of the effects of capitalism upon law. They have been advanced by eminent thinkers—for example, in this country by Professor Cohen, in England by Professor Laski, in Austria by Renner, in Germany by Professor Radbruch. The gist of it is: Capitalism contradicts its own legal basis. This basis, as exposed, for instance, by Professor Commons

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and Professor Diehl in their books on *Legal Foundations of Capitalism*, is purely individualistic; every economico-legal unit is a "person" and a person is a capitalist as well as a proletarian—the rich as well as the poor, the weakest worker as well as a gigantic corporation. The characteristics of this abstract person are legal equality, equal freedom of acquiring property, equal freedom of contract. But liberty includes the liberty of the strong to oppress the liberty of the weak and this perverted liberty has become economic reality. Freedom of acquiring property is inevitably also freedom of disposal over men, freedom to command human labor by dictating their wages and to tax fellow citizens in the form of rents, utility charges, and fees. *Dominium* becomes *imperium*, becomes "capital" in its technical sense.

Thus arises a tension between law and reality, the liberal individualistic law which is the ideological basis of economic reality and this reality itself; and the more capitalism progresses, the more it degenerates into economic dictatorship. There is no remedy to be expected from those organs of society which have to enforce that law, especially from the courts. For the courts have to apply the law, and the law, as we said, is so abstract that it cannot easily be said to be violated by whatever form of exploitation and oppression develops under its aegis. Of course, there may be and practically there are everywhere special statutes for the protection of the weak; there is a whole body of social legislation. But, say the socialist critics, these laws, again, offer no protection; the law always lags behind the economic development and those elderly men called judges who, as a rule, are even more conservative, lag behind the law. This, it is asserted, is especially dangerous in the case of the United States, where the abstract principles of liberalism are embodied in the old eighteenth-century Constitution and where the courts have the right to declare every statute and act of Congress void if contrary to the Constitution. More-

over, the judges in this country are selected from the most successful lawyers, *i.e.*, from the most successful advocates of capitalistic interests.

III

Let me quote just one example: *Adkins v. Children's Hospital of the District of Columbia*.² In this famous case Congress, by an act of 1918, had provided for the fixing of minimum wages for women and children in the District of Columbia. Now the Supreme Court had to deal with two cases: one of the women employed in a hospital, the other of a woman employed in a hotel. They were all contented with their wages, at least they could not find better jobs; therefore they claimed an injunction against the Minimum Wage Board to restrain it from enforcing its order on the ground that this order was in contravention of the Constitution and particularly the famous clause of the Fifth Amendment: no person shall "be deprived of life, liberty, or property, without due process of law." In the first instance the injunction was granted; in the second instance it was refused and this decision was upheld by the court of last resort. Justice Sutherland, in delivering the opinion of the Court, said among others: "that the right to contract about one's affairs is a part of the liberty of the individual protected by this clause, is settled by the decision of this Court and is no longer open to question. . . . Within this liberty are contracts of employment of labor." The Court then referred to other cases, such as *Lochner v. New York*³ and *Holden v. Hardy*,⁴ in which statutes fixing maximum hours of labor had been held unconstitutional "as an unreasonable, unnecessary and arbitrary interference with the liberty of contract." The Court declared, among other more or less convincing arguments: "The law is not confined to the great and powerful employers but embraces those whose bargaining power may be as weak as that

of the employee," thus barring the suspicion that the decision was in the interest of big business.

IV

In view of such decisions the socialist critics say: Let us establish a social law instead of an individualistic law. Let us do away with that abstract being, the "person," and let us face the typical social figures behind it, the social positions with regard to power and powerlessness, the figures of the entrepreneur and the wage earner, the worker and the employer. Not to protect an alleged equality, but the equalization of what is really unequal ought to be the aim of the law. Thus the individual ought to be conceived of by the law as a social unit, a member of the community, and, therefore, even the most private legal affair ought to become a social relation in which not only the parties immediately concerned have a say but also, and above all, society. By all these means, and only in this way, can we reach the great goal, the concordance of reality and law, or of the law's form and its matter.

V

Now all this sounds very convincing, and I am afraid I have just made more adherents to the socialistic outlook. Let me, therefore, try to show the flaw in this argumentation. This is really very simple and obvious: All that has been said does not prove that capitalism has failed in the sphere of law; it proves that those who ought to have adapted the law to changed circumstances and the ideals of social justice have failed. I do not deny for an instant that in the name of the law crimes have been committed, but I do deny that the accused is the perpetrator. Responsible, on the one side, are the whole legal profession, judges, lawyers, and teachers of law, and on the other side the weaker classes of those

subject to the law, especially the laborers. The legal profession is called upon not only to administer the given law but also to develop, adjust, and reform it, and this is in particular the task of enlightened judges. This task is today recognized everywhere. Efficient work has been done in France by the sociological school of Geny, Saleilles, Lambert; in Germany and Austria by the "free law movement," of which it may suffice to name men like Ehrlich, Zitelmann, Ernst Fuchs, and that unknown author who writes under the pseudonym of Gnaeus Flavius. In America we may point out leaders of legal thought like Dean Pound, and among the judges the honored names of Oliver Wendell Holmes, Louis D. Brandeis, and Benjamin N. Cardozo. We now know that every legal concept is vague and lends itself to various constructions; that every legal rule, no matter whether embodied in decisions or statutes, permits various interpretations; and that those constructions and these interpretations must be determined by the social, economic, and political conditions from which we can infer the objective purposes of the law (which ought not to be confused with the subjective intents of individual legislators). These purposes alone bind the courts. Therefore, as these conditions change, the application of the law must change correspondingly. The cases presenting themselves under the changed conditions are not similar to the cases decided, and the rule of *stare decisis* does not apply to them. The subject⁵ is far too vast to be discussed here, but the arguments are given in full in the works of the aforementioned jurists, to which we may add the well-known writings of such American authors as Morris R. Cohen, Walter W. Cook, A. L. Goodhart, Karl N. Llewellyn, and many others.

These tendencies may already be called victorious. On January 8, 1934, the Supreme Court of the United States handed down a five to four decision in the *Blaisdell*⁶ case. Here Chief Justice

Hughes, with whom Justices Brandeis, Stone, Roberts, and Cardozo concurred, declared among other things: "Where in earlier days it was thought that only the concerns of individuals or classes were involved and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected, and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends." Even in that notorious decision of 1923 of *Adkins v. Children's Hospital*,⁷ only five of the nine judges concurred in the view that fixing minimum wages was unconstitutional, and among the dissenting opinions we find Justice Holmes who said, with regard to the women who opposed the minimum wages law because they preferred low wages to no wages, "The fact that the statute warrants classification which like all classification may bear hard upon some individual or in exceptional cases . . . is no greater infirmity than is incident to all law." Here the social point of view as opposed to the individualistic is clearly apparent. The issue is, however, clouded by the habit of calling the judges either "conservative" or "liberal." But if we use these terms in their classical meaning, the "conservatives," being individualists, ought to be named "liberals," while the alleged "liberals" would more appropriately be called "solidarists." If one wishes to denote not the political tendencies of the judges, but the more or less great rigidity of their method, the "conservative" judges ought to be opposed to the "progressives." Of course, the "progressive" and "free" methods of interpretation presuppose a more dynamic attitude toward law and State in general than that of the traditional method. It implies the conception that judges are creative organs of the law's development and not, as the Byzantine dogma would have it, mere tools of an omnipotent lawgiver, not what Montes-

quieu called them, "*des êtres inanimés, la bouche qui prononce les paroles de la loi.*" This ancient philosophical conception is the cultural background of the American Constitution, and to it we must add the social conditions in precapitalistic Colonial times, which made centralization of legislative power impossible and a rigid federal constitution desirable. Both reasons explain decisions like that in the *Schechter Case*.⁸ Here too, capitalism is unjustly blamed when it is asserted that this decision shows how social progress and economic reform are incompatible with the laws of a capitalistic society. Under any of the modern and elastic constitutions of the centralized capitalistic European states this decision would have been partly unnecessary, partly impossible.

VI

The other group that is to blame for what capitalism is saddled with is the working class. It is up to them to organize themselves so powerfully that the same abstract liberty of property and contract which so often works to their disadvantage cannot be turned against them, but becomes their own weapon. Then they would need no special laws of dubious constitutionality, since no courts, however conservative, could interfere with their aspirations and politics. One ought not to oppose that such a task far transcends "the strength and the tools of the labor class." This great problem, likewise, cannot fully be discussed here, and, moreover, the lawyer must leave it to the political scientist. I restrict myself to the raising of two questions. Has the labor class ever earnestly tried to put an end to the fratricidal internal struggles that account for its lack of strength, the struggles among socialists, communists, and syndicalists, among Marxian, Christian, and national socialists, between skilled and unskilled, organized and unorganized, native and foreign labor? And why have they nowhere developed, as their indispensable tool, a labor

press of a high journalistic level, instead of abandoning the workers, especially in America and until lately also in England, to the lowest type of the bourgeois newspapers? Capitalism has certainly not fostered the unity of the workers nor favored an independent labor press. But if labor were bent upon having both it would have them, and through them control of every capitalistic country. Of course, all this presupposes again a certain political situation; namely, democracy, especially educational democracy. But democracy is not incompatible with capitalism or less incompatible than any form of government that has been tried out in history. On the contrary, capitalism is based on rational foresight, particularly on strict application of the laws by impartial courts, guaranteeing equality before the law. The founders of American capitalism have been described as "robber barons" and their successes attributed to a long series of unpunished crimes. But what does that prove except that American political democracy has not kept pace with its economic sister, capitalism? The original "robber barons" were a precapitalistic and predemocratic phenomenon. Here lies the solution of the problem which, of course, can scarcely be sketched in the few minutes at my disposal.

But first we have to give some more precision to our question. The question whether Capitalism has failed depends largely upon what we understand by "failed." There are at least four possible meanings. Do we mean "failed" as compared with the precapitalistic, for instance, the feudal-handicraft economics? Those who dream of a return to those golden days are romantic ignorants, and every student of economic history will tell them that in precapitalistic times the average peasant, to say nothing of the agricultural laborer, had less bread, worse housing conditions, less security of existence, minor civic rights, and far fewer enjoyments than even the unemployed worker of today. Unemploy-

ment, it is true, was less frequent, but its place was taken by famine which was a normal phenomenon of precapitalistic Europe and still is in every noncapitalistic and the one postcapitalistic country. Unjust discriminations between rich and poor in the law and its administration are still very frequent, but capitalism cannot be made responsible for them since every precapitalistic society was far worse in this respect. Nor ought it to be overlooked that precapitalistic economics did not provide even that modest measure of "equal opportunity" which the allegedly antidemocratic capitalistic system provides indeed. I am, of course, alluding to the modern methods of saving and credit, which have been so successfully developed in America. It needs courage to say a word in favor of American banking to an American audience, and I am fully conscious of the tremendous misuses the credit system has been exposed to, especially in this country. But there is no tool, however useful, that cannot be misused for criminal purposes, and it is the task of the law to frustrate them. This is not an appeal to interventionism but to coercion of those who menace economic liberty, coercion in the interest of economic liberty, just as a State based on tolerance must be intolerant of nothing except intolerance.

Or does one mean "failed" in comparison with the achievements of the postcapitalistic system of socialism? This question we cannot answer, because socialism has never been successfully tried and socialists generally decline to tell us how their society would work, a question on which Marx himself has put his taboo, probably for good reasons.

Or does "failure" mean failure compared with the hopes and promises of the fathers and first advocates of capitalism? Here the answer may seem doubtful. We have certainly not lived to see the promised land of general welfare, of harmony of interests, constantly progressing wealth, world-wide free trade, and per-

manent peace. But I suspect very much that our grievances are due less to capitalism than to the constant interferences with the autonomous mechanism of the market, which is the very essence of capitalism, and these interferences, although partly self-imposed, are often due to precapitalistic, particularly mercantilistic, tendencies which still survive—for instance, protectionism and its fruit, monopolies. Or they are due to extracapitalistic, because extra-economic, forces like nationalism which, I do not deny, the capitalists themselves championed, and insofar it may be said that capitalism has less failed than committed suicide. Here we meet with the World War, which was an outcome not of capitalism but of nationalism and which still remains by far the most important cause among the many causes of the present crisis, a crisis not of capitalism but of extracapitalistic forces. Or, finally, these interferences are a foreboding of an anticapitalistic system, of that very socialist system which has been developing in the last century under the garb of its enemy, capitalism. I was glad to read in a recent article by one of the greatest living economists, Professor Schumpeter, of Harvard, that the present crisis is due to a capitalism “which nations are determined not to allow to function.”

“Failure” may mean failure in the light of that ideal which is or ought to be the goal of every economic system: to secure for everybody a life worth living. Here the answer must be an emphatic denial. Capitalism has *not* failed to procure such an existence in those countries where the conditions for its own development existed until these conditions were disturbed by the present extracapitalistic crisis. If we group those countries in which capitalism was least hampered by interventionism, including protective duties and trade regulations, and by socialism, and most strongly united to democracy and liberalism, and on the other hand those countries where the opposite conditions pre-

vailed and capitalism was not allowed to "function," the contrast is overwhelming. On the one side we find modern England, the three Scandinavian countries, Holland, and, to a certain degree, Switzerland; they signify a comparatively high standard of living, especially of the working classes, a high general level of culture, the highest degree of honesty in business and private life yet attained, an efficient civil service, an incorruptible judiciary, a law-abiding population, peaceful foreign politics, contempt of militarism, high sexual and other morality, respect for women, protection of children, strong influence of religious and humanitarian forces—in one word, a world far from ideal, but less unfit for human beings to live in than any other we know. On the other hand we have all the other countries in which these enviable conditions are the less to be met with the more these countries have given up individualistic capitalism, democracy, and liberalism. I am speaking of protectionist America and France, fascist Italy and Germany, and of those countries that, like Spain and the Balkans, Russia and Turkey, China and India, have not yet reached that phase. The latter countries ought to look to the former for guidance, but as a rule, with the exception of England, they are not even mentioned. No one who would ask any of the American or English detractors of capitalism how they accounted for Danish or Dutch conditions would get a satisfactory answer.

I am fully aware that no considerations of any kind can save individualistic capitalism. I am convinced that the future belongs to State capitalism with a tendency toward socialism—to national, not to international, socialism. Socialist propaganda has made capitalism a spiteful byword which even the capitalists begin to be ashamed of using. Capitalism has been sentenced by history and public opinion, but the witnesses have been false, the advocates weak, the jury biased, and the verdict they returned was untrue.

NOTES

¹ This article was Professor Kantorowicz's contribution to a symposium held in 1934 by members of the New School for Social Research Graduate Faculty of Political and Social Science ("University in Exile") on the question: "Has Capitalism Failed?" Two other members, Professors Lederer and Feiler, had discussed the economic aspects of the problem. Professor Lederer's contribution has been published in (1934) 3 AMERICAN SCHOLAR 294-301.

² 261 U. S. 525, 43 Sup. Ct. 394 (1923).

³ 198 U. S. 45, 25 Sup. Ct. 539 (1905).

⁴ 169 U. S. 366, 18 Sup. Ct. 383 (1898).

⁵ This subject is dealt with by the author in Kantorowicz and Patterson, *Legal Science — A Summary of Its Methodology* (1928) 28 COL. L. REV. 579; Kantorowicz, *Some Rationalism about Realism* (1934) 43 YALE L. J. 1240.

⁶ Home Bldg. and Loan Assn. v. Blaisdell, 290 U. S. 398, 54 Sup. Ct. 231 (1934).

⁷ 261 U. S. 525, 43 Sup. Ct. 394 (1923).

⁸ A.L.A. Schechter Poultry Corp. v. United States, 295 U. S. 495, 55 Sup. Ct. 837 (1935).